IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

RSA No.274 of 1999.

Judgement reserved on: 24.7.2007

Date of decision: 26.7.2007

Narpat and Ors. **…….Appellants**

Vs.

Smt. Devki **…. Respondent.**

Coram

The Hon'ble Mr. Justice Kuldip Singh, Judge.

Whether approved for reporting?[1] No.

For the Appellants : Mr. K.D. Sood, Advocate.

For the Respondent : Mr. Subash Sharma, Advocate.

Kuldip Singh, Judge.

The defendants are in appeal against judgment, decree dated 6.4.1999 passed by learned District Judge, Mandi in Civil Appeal No.72 of 1993, confirming judgment, decree dated 21.9.1993 passed by learned Sub Judge Ist Class, Sundernagar, District Mandi in Civil Suit No. 12/89. The parties are referred in the same manner as in the trial Court.

2. The brief facts of the case are that plaintiff filed a suit for declaration, permanent prohibitory and mandatory injunction against defendants by pleading that the land comprised in Khata Khatauni No.15/17, 17/19, plaintiff has got ½ share in Khewat No.15 measuring 2-12-6 bighas, ¼ share in Khewat No.17 measuring 1-0-7 bighas. The plaintiff's share comes to total measuring 3-12-13 bighas . The

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Whether the reporters of the local papers may be allowed to see the Judgment? Yes

plaintiff is an old illiterate and sick lady. The defendants taking advantage of these facts played fraud with plaintiff by getting gift deed registered of the aforesaid property from her in their favour. The plaintiff was given an impression that she was to execute a Will in favour of the defendants, but infact by playing fraud, mis-representation, they got executed gift of the suit land in their favour. In November 1988 the defendants tried to cut grass and cultivate the suit land. The plaintiff resisted and requested the defendants not to interfere on her land, the defendants at that time told the plaintiff that she was not the owner of suit land as she had executed gift of this land in their favour. Thereafter, plaintiff obtained a copy of the jamabandi from the Patwari from which she came to know about the entry. In these circumstances, she filed the suit.

3. The defendants contested the suit by filing written statement, in which they have taken preliminary objections of limitation, lack of particulars regarding fraud, estoppel and valuation. On merits the defendants denied that they played fraud with the plaintiff. According to defendants, plaintiff voluntarily executed gift deed which was registered on 10.6.1985. They have denied that an impression was given to the plaintiff that she was executing a Will. They have denied that they interfered on the suit land in the year 1988. They have submitted that they are in possession of the suit land under the gift.

4. The trial Court decreed the suit on 21.9.1993, declaring that the gift deed Ex.DW3/A is null and void and not binding on the plaintiff. The plaintiff was given decree of possession of the suit land

subject to condition that plaintiff would pay the deficient court fee within a fortnight from the date of decree, failing which suit shall be deemed to have been dismissed.

5. The defendants filed an appeal which was dismissed by learned District Judge on 6.4.1999. The defendants are now in second appeal. The appeal has been admitted on following substantial questions of law:-

1. *Whether in view of the facts and circumstances of the case that the gift was executed and registered on 10.6.1985 and the plaintiff came to know of the changed entries in the revenue record on 11.10.1985, the suit filed on 2.1.1989 was within limitation?*
2. *Whether the courts below have misconstrued section 122 of the Transfer of Property Act and the important oral and documentary evidence particularly DW-3/A the statement of PW 1 Devki, DW 3 Sant Ram, DW 6 Gandhi Ram and DW 7 Nirmal Singh and the findings that the gift was obtained by misrepresentation and fraud are not sustainable in law?*

6. I have heard the learned counsel for the parties and have also gone through the record.

7. The learned counsel for the defendants has submitted that the suit was time barred. He has also submitted that important oral and documentary evidence such as gift deed Ex. DW 3/A, statements of PW 1 Devki, DW 3 Sant Ram, DW 6 Gandhi Ram and DW 7 Nirmal Singh have been misconstrued. He has also submitted that deficiency in the court fee was not made good by the plaintiff as

per judgment of trial Court, therefore, the suit shall be deemed to have been dismissed. The appeal filed by the defendants against trial Court judgment, decree before the Ist Appellate Court is in consequential. The learned counsel for the plaintiff has supported the impugned judgment, decree.

Substantial Question of Law No.1

8. It has been pleaded in the plaint that in November, 1988 defendants entered the disputed land and tried to take away grass and cultivate the land, the plaintiff resisted the tress pass and at that time defendants disclosed that she was no longer owner of the suit land as she had executed gift of suit land in their favour. Thereafter plaintiff obtained the jamabandi from the Patwari and came to know about the entry. Gift deed Ex.DW 3/A was allegedly executed on 10.6.1985 and was registered on the same date. Plaintiff Devki has appeared as PW-1. She made her statement in the Court on 30.6.1992. She has stated that she was illiterate. She has further stated that a few days prior to the institution of the suit defendants cut her grass and maize crop. The defendants told her that she had no concern with the land. She thereafter went to the Patwari and thereafter filed the suit. The issue No.4 is of limitation. The trial Court has recorded a finding of fact that the plaintiff came to know wrong entry in November, 1988 and the suit was filed on 2.1.1989. It has also been held that under the impression of Will defendants obtained gift deed by playing fraud and mis-representation. The limitation will start when she came to know about the nature of the instrument. The lower Appellate Court has also recorded a finding

that the plaintiff came to know about this wrong entry in November, 1988 and the suit was filed on 2.1.1989. The two Courts below have recorded a finding of fact that plaintiff came to know about the fraud in November, 1988. The learned counsel for the defendants has failed to point out that the plaintiff was aware of the nature of the document prior to November, 1988. The suit having been filed on 2.1.1989 is thus within limitation. The findings recorded by two Courts below on the point of limitation require no interference. The substantial question of Law No.1 under consideration is decided against the defendants and in favour of the plaintiff.

Substantial Question of Law No.2

9. The learned counsel for defendants has submitted that it is the case of the plaintiff that she was to execute a Will but instead of Will a gift was got prepared from her by defendants. He has further submitted that this plea of the plaintiff has not been proved from the material on record, the two Courts below have misconstrued and mis-interpreted oral and documentary evidence on record. The defendants served the plaintiff and therefore, plaintiff voluntarily and knowingly executed gift deed Ex.DW-3/A in favour of the defendants. It has not been made clear either in the written statement or even in the evidence how the defendants were connected with plaintiff. In the statement of the plaintiff it has come that her mother was alive and she was living with her brother. Defendant No.2 Sant Ram told her to execute a Will which could be changed later on but defendants got executed gift deed from her by playing fraud without disclosing her the nature of the document. The defendant No.2 Sant Ram has

admitted in his cross-examination that mother of plaintiff and her uncle had left her. He has very specifically stated that he had taken no responsibility to look after plaintiff. He has also admitted that after gift plaintiff has left no land for her livelihood. DW-6 Gandhi Ram has admitted that at the time of registration of gift deed Ex.DW-3/A no near relation of plaintiff was present. The trial Court has recorded a finding of fact that the marginal witnesses of the gift deed are the relations of the defendants . The lower Appellate Court has returned a finding that the gift deed Ex.DW-3/A cannot be said to be executed by plaintiff voluntarily. A specific finding has been recorded that gift deed was got executed by playing fraud and mis-representation. It was not sufficient that the document was read over to her. The defendants were required to prove that plaintiff understood the nature and consequences of gift deed Ex.DW-3/A. The learned counsel for the defendants has failed to point out how the Courts below have mis-interpreted and misconstrued the statements of PW-1 Devki, DW-3 Sant Ram, DW-5, Gandhi Ram and DW-7 Nirmal Singh. The finding on misrepresentation and fraud is a finding of fact which requires no interference. The substantial question of Law No.2 is accordingly decided against the defendants and in favour of the plaintiff.

10. The learned counsel for the plaintiff has also submitted that the trial Court had passed conditional decree. The plaintiff was to make good the court fee within 15 days, failing which, the suit shall be deemed to have been dismissed. He has submitted that the requisite court fee was not paid by the plaintiff within the time fixed and therefore, the suit shall be deemed to have been dismissed as

per operative part of the decree. The perusal of the decree of the trial Court would show that additional court fee was affixed by the plaintiff within time granted by the Court. The defendants who filed first appeal never questioned in the first appeal regarding the alleged deficiency in the court fee even after the judgment, decree of the trial Court. This point cannot be permitted to be raised by the defendants in second appeal.

11. The result of above discussion, the appeal is dismissed. No order as to costs.

(Kuldip Singh)
Judge.

July 26, 2007
(sks)